Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1750

MICHIGAN NATIONAL BANK, Petitioner
v.
W. J. URSURY, JR., Secretary of Labor
UNITED STATES DEPARTMENT OF LABOR, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in an action brought by the Secretary of Labor against an Employer under the Fair Labor Standards Act, it is appropriate for the District Court to require the Secretary, in response to interrogatories, to disclose merely the names of all employees interviewed by the Secretary without disclosing their statements?

2. Whether, in an action brought by the Secretary of Labor against an Employer under the Fair Labor Standards Act, the government can extra-judicially preclude discovery by the Employer by merely self declaring the protection of an "informant's privilege" for all those Employers which the Secretary of Labor has solicited by written or oral interview.

3. Whether, in the absence of finding a clear abuse of discretion, the Court of Appeals may reverse a trial court discovery order requiring the Secretary of Labor to disclose merely the names of all employees interviewed by the Secretary without disclosing their statements. Where the Trial Court made a finding that the informers privilege was inapposite.

IN THE

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NO.

MICHIGAN NATIONAL BANK, Petitioner
v.
W. J. URSURY, JR., Secretary of Labor
UNITED STATES DEPARTMENT OF LABOR, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

Michigan National Bank petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

There are no official or unofficial reports of opinions in the matter available at this time.

JURISDICTION

The Order of the Court of Appeals including a dissent (Pet. App. pp 1a-3a) was entered on February 10, 1978. The Order of the Court of Appeals denying rehearing (Pet. App. p 4a) was entered April 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

STATUTES INVOLVED

(None)

STATEMENT

A. PROCEEDINGS BEFORE THE DISTRICT COURT

This action was commenced by Respondent, Secretary of Labor, under Section 17 of the Fair Labor Standards Act, 29 U.S.C. §217, alleging violation of the equal pay provisions of the Act, 29 U.S.C. §206 (d)(1). The Petitioner, Michigan National Bank, is a national banking corporation with a place of business in Southfield, Michigan where it operates a credit card business.

In the Complaint, Respondent alleged violation of the Fair Labor Standards Act by paraphrasing the conclusory language of 29 U.S.C. §206(d)(1), to wit:

> "Defendant, an employer having employees employed in an enterprise engaged in commerce or in the production of goods for commerce as aforesaid, has repeatedly violated and is violating the provisions of sections (6d) and 15 (a) (2) of the Act, by discriminating, within the aforesaid establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at rates less than the rates at which it pays wages to employees of the opposite sex in such establishment for equal work on jobs, *the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions*".

Petitioner denied the alleged violation in its Answer filed November 1, 1974 and on February 26, 1975 propounded interrogatories, two of which were as follows:

> "2. . . .
> (e) were any of Defendant's employees personally interviewed? If so, state their names.
> • • •
> 10. Have any of Defendant's former employees been interviewed (other than any included in Question 2(e)? If so, state their names and addresses."

It should be noted that neither interrogatory requested the identity of any partiiular employee or employees upon whose information the action was brought or the time of their being interviewed.

Respondent answered both questions in the affirmative but refused to disclose the names alleging "informer's privilege" as their basis for nondisclosure.

On June 19, 1976, Petitioner filed its Motion for Order Compelling Answer to Interrogatories. A hearing was held before Judge Joiner on July 21, 1975.

Respondent filed a Claim of Privilege and Confidentiality with an Affidavit on July 28, 1975. An additional court hearing was held on August 25, 1975 at which time Judge Joiner ruled as follows:

> "Now, I want to underscore that it is not required by the Government to disclose who it was that came to them first or who it was that started this investigation, or who it was that triggered this investigation, or who it was that was pushing this investigation in any way by the Government's admission in this case.
> The Government, after some triggering device, has entered into an extended series of conversations or inquiry or has sent out a series of questionaires to a number of people.
> Therefore, the disclosure of all of these people who were employees at any time or who are now employees of those persons to whom those questionaires went and from whom there were returns does not in

any way identify any particular person or who was an "informer" in the sense that an informer was used in *Roviaro* or in other cases dealing with the informers privilege.

I hold that you are required to disclose the names of the persons to whom and from whom you have acquired information so that the defendant may make inquiries as to what these people know. I will give you sixty days in which to give this information to the defendant, and I will reserve ruling at this time as to what will be the sanction if you do not give the information to defendant." (Emphasis supplied) (Pet. App. p 12a)

On January 28, 1976, Judge Joiner entered a written Order Compelling Answer to Defendant's Interrogatory 2(e) which required Respondent to submit simply the names of those employees whom Respondent interviewed or obtained information from. Such order required compliance on or before March 31, 1976.

However, on March 16, 1976 Respondent filed its motion seeking reconsideration of Judge Joiner's January 28, 1976 Order. Judge Joiner denied reconsideration on March 29, 1976.

Respondent continued to refuse to comply with Judge Joiner's original order and two weeks after the date set for compliance filed still another motion on April 14, 1976. This was a Motion to Amend January 28, 1976 Order and to Certify Order to the Court of Appeals. On that same date, April 14, 1976, Petitioner filed its Motion to dismiss due to Respondent's refusal to comply with Judge Joiner's order.

Proceedings were held in open court on May 4, 1976 at which time Respondent admitted its past refusal to comply with the disclosure order. Further, Respondent submitted

at that time a partial list of employees but steadfastly refused to tender all the names required by Judge Joiner's order. (Pet. App. pp 14a-15a).

As a result Judge Joiner entered a written order on May 27, 1976 which disposed of the case, to wit: "Order Denying Plaintiff's Motion to Amend January 28, 1976, Order and to Certify Order to the Court of Appeals and Granting Defendant's Motion to Dismiss". (Pet. App. pp 15a-16a)

B. THE DECISION OF THE COURT OF APPEALS

A panel of the Sixth Circuit Court of Appeals with one Judge dissenting, reversed the district court by its order entered February 10, 1978. The Court of Appeals' Order reversed as a matter of law stating that the District Court's Ruling ". . . does not conform to our decision in *Dunlop* v. *Carriage Carpet Co.*, 548 F2d 139 (6th Cir. 1977" (Pet. App. p 1a).

REASONS FOR GRANTING THE WRIT

The Decision below holding that the Respondent Secretary of Labor in this action brought under the Fair Labor Standards Act is privileged as a matter of law from disclosing the names of Petitioner's employees who were interviewed by the Respondent is erroneous and is in direct conflict with other Courts of Appeals and the United States Supreme Court. In these circumstances, and since the issues are recurrent ones in the administration of the Act, review by this Court is warranted.

1. The trial court in the instant case recognized that the mere disclosure of the names of employees interviewed by Respondent "does not in any way identify any par-

ticular person or who was an 'informer' " (Pet. App. p 12a). Without addressing itself to this fact, the Court of Appeals reversed. This is in direct conflict with other Court of Appeals Decisions and the United States Supreme Court which demonstrate that the informer's privilege becomes operable only when the identities of an employee as an informer would result.

In *Mitchell* v. *Roma,* 265 F2d 633 (3rd Cir. 1959), the Third Circuit, with respect to a list of 85 names of employees and former employees which the Secretary did disclose, observed at page 637:

> "... The fact that a person has knowledge doesn't mean that he has informed others of his knowledge ..."

In like accord are decisions from the Fourth, Fifth and Eighth Circuits to wit:

Wirtz v. *BAC Steel Products, Inc.* 312 F2d 14 (4th Cir. 1962)

United States v. *Hemphill,* 369 F2d 539 (4th Cir. 1966)

Hodgson v. *Charles Martin Inspectors of Petroleum, Inc.* 459 F2d 303 (5th Cir. 1972)

Wirtz v. *Contintal Finance & Loan Co. of West Bend,* 326 F2d 561 (5th Cir. 1964)

Brennan v. *Engineered Products, Inc.* 506 F2d 299 (8th Cir. 1974)

In every one of these decisions the Secretary did disclose mere names to the Employer; however, the various Courts of Appeal refrained from granting discovery of statements which would identify an employee as an "informer".

The Petitioner contends that the Sixth Circuit Court of Appeals Decision in the case at bar is erroneous. The effect

of the Decision is to rule that the disclosure of the mere names of employees interviewed is violative of the informer's privilege as a matter of law *per se* without regard to whether such disclosure identifies any particular employee as "an informer". Moreover, such a decision has the added effect of depriving a defendant of the right to defend himself without due process of law contrary to the courts ruling in an analogous criminal case, *Roviaro* v *United States,* 353 U.S. 53 (1957).

2. The Respondent Secretary of Labor in this action interviewed several employees and former employees of the Petitioner, both orally and by written questionaire. In both types of inquiries, Respondent extra-judicially declared in the interviewee that the interview would be confidential. In response to Petitioner's propounded interrogatories 2(e) and 10, the Respondent has decreed a self-serving "informer's privilege" without any showing of need. Petitioner seeks *names* of persons so interviewed. Respondent's refusal to reply by declaring an extra-judicial "informer's privilege" thus effectively precludes Petitioner from discovery unless Petitioner deposes all of its past and present employees, *whose population is in the hundreds.* Petitioner respectfully submits that the Sixth Circuit Court of Appeals erred below in upholding such conduct and that the Decision of the Court violates the intent of the Federal Rules of Civil Procedure.

3. In *Roviaro* v. *United States,* 353 *supra,* (1957), this Court stated at page 62:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for *balancing* the public interest in protecting the flow of information against the individual's right to

prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." (Emphasis Supplied)

Although it was a criminal case, *Roviaro* has been cited by Circuit Courts of Appeals as authority for the rule governing disclosure in civil cases too. Thus the Ninth Circuit in *Witrz* v. *Rosenthal*, 388 F2d 290 (9th Cir. 1967) held:

> "Having in view the limitations on the 'informers privilege' as set forth in *Roviaro;* the findings of fact of the trial court on the question of 'good cause', which findings are not clearly erroneous; and the wide discretion vested in the District Court in balancing the public interest in maintaining the privilege as against the necessity of obtaining the information in order to achieve a fair trial; we hold that under the particular circumstances of this case the District Court did not err."

An the Eighth Circuit likewise observed the discretionary nature of a trial court order regarding disclosure of informers when in the case of *Brennan* v. *Engineering Products, Inc.* (supra) it stated at page 303:

> ". . . the jurist initially called upon to strike the balance is entitled to some leeway at those points in the process at which the determinations are essentially judgmatic . . ."

The Decision here is directly in conflict with the Decisions of the Eight and Ninth Circuits and the United States Supreme Court in *Roviaro*. The Decision of the Sixth Circuit under examination in the instant case appears to reverse the trial court's discovery order as a matter of law, for the court reversed stating merely that the trial court's

Decision ". . . does not conform to our decision in *Dunlop* v. *Carriage Carpet Co.*, 548 F2d, 139 (6th Cir. 1977)". Nowhere in the present case or in the *Carriage Carpet* is there any reference to the discretionary nature of discovery orders generally or to orders regarding disclosure of informers in particular.[1]

Petitioner contends that in this regard the Sixth Circuit's Decision is erroneous and demonstrates a conflict with the decisions of other circuits. The decision of the court below creates uncertainty in this important area which warrants resolution by this Court.

4. The issues presented in the instant case are recurrent where the government is a party to litigation. The decision of the Court of Appeals here fails to recognize the problems which the District Courts face at the trial level where decisions are made on the daily "firing-line" of litigation.

District Court cases manifest an understanding of the unfair advantage which the Federal Government often attempts to obtain through its self-declared informer's privilege. The cases of *Equal Employment Opportunity Commission* v. *Los Alamos Constructors, Inc.*, 382 F. Supp 1373 (DC N. M. 1974) and *Brennon* v. *Automatic Toll Systems*, 71 Labor Cases ¶32,937 (1973) are superlative examples of how the Federal Trial Courts should react to the government's abusing the concepts of informer's privilege. Guidance from the Supreme Court of the United States now

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[1] It is worthy of note that in the *Carriage Carpet* case, the Circuit Court stated that the "sole" question was whether a former employee is protected from employer discrimination by Section 15 of the Fair Labor Standards Act of 1938. Such "sole" issue has never been remotely raised by either party in the present case. See also Judge Meritt's dissenting opinion in the present case. (Pet. App pp 2a-3a).

appears necessary in order to finally establish the rule to be applied to "informer's privilege" in civil litigation.

5. The petitioner is aware of the heavy work load of the United States Supreme Court. However, when the majority in the Court of Appeals misses completely a legal proposition and decides a case contrary to this Courts' decision in "Roviaro" supra where else can one go for help?

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
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No. 76-2159
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

W. J. USERY, JR.,
Secretary of Labor
United States Department
of Labor,
Plaintiff-Appellant
vs. ORDER
MICHIGAN NATIONAL BANK,
a corporation doing business
as Michigan Bank Americard,
Defendant-Appellee

Before WEICK, EDWARDS and MERRITT, Circuit Judges.

Upon consideration of the briefs, the appendix, and oral arguments of counsel, we are of the opinion that the order of the District Court requiring the Secretary to furnish to the Bank the names of all present and former employees of the Bank who had given information to the Secretary, does not conform to our decision in *Dunlop* v. *Carriage Carpet Co.*, 548 F.2d 139 (6th Cir. 1977).

It is therefore ORDERED that the judgment of the District Court be reversed, and that this cause be remanded for trial. It is further ORDERED that the Secretary furnish to the Bank a list of employees and former employees of the Bank whom it expects to call as witnesses at the trial, which list shall be furnished not less than thirty days before the trial date.

ENTERED BY ORDER OF
THE COURT
/s/ JOHN P. HEHMAN
Clerk

No. 76-2159, *W. J. Usery, Jr., Secretary of Labor* v. *Michigan National Bank*

MERRITT, Circuit Judge, dissenting. Our system of justice wisely does not favor privileges which impede the free flow of information in judicial proceedings. See 8 Wigmoe, *Evidence* §§ 2191-92, 2367-93 (McNaughton ed. 1961).

Here the government interviewed a large number of defendant's employees, perhaps as many as a hundred (the government refuses to divulge the precise number), apparently during working hours on defendant's premises with defendant's permission. The government now refuses to comply with Judge Joiner's order to furnish on discovery the names of the employees interviewed. Its refusal is based not on a claim of relevancy but on a claim that the employees—all of them—are "confidential informants" entitled to the same privilege as the frightened insider who comes to the FBI with information that members of his group are committing a crime. The employees, however, are not asserting the privilege here, only the government; there is no showing that the employees are frightened, and there is no evidence and no real reason to suspend that the bank is going to punish the employees whom the government selected for an interview.

The sex discrimination statute itself provides a remedy for harassment, and the remedy given is not the broad privilege claimed by the government. There is no statutory basis for the privilege, and there is no reason to create a new privilege allowing the government to keep secret on discovery the names of everyone interviewed in civil proceedings.

It should make no difference that in this case the government may be engaged in the salutory business of suppressing sex discrimination in employment. It might instead be suppressing the Pentagon Papers or investigating "disloyalty" among government employees. We should be skeptical each time a government agency seeks to erect or extend a broad privilege against judicial disclosure of information becouse each time this happens litigants lose a small procedural right which makes it more difficult for them to do battle with the government in the courtroom on equal terms.

Dunlop v. *Carriage Carpet Co.*, 548 F.2d 139 (6th Cir. 1977) does not *hold* that all employees who are interviewed in sex discriminaiton, FLSA or other similar investigations are entitled to the confidential informant privilege. Its holding is addressed to an entirely different question. I recognize, however, that there is dicta in the opinion which tends to support that conclusion, but I do not find the dicta persuasive.

No. 76-2159

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

W. J. USERY, JR.,
Secretary of Labor
United States Department
of Labor,
Plaintiff-Appellant

vs

ORDER DENYING
PETITION FOR REHEARING

MICHIGAN NATIONAL
BANK,
a corporation doing business
as Michigan Bank Americard,
Defendant-Appellee

Before WEICK, EDWARDS and MERRITT, Circuit Judges.

The petition for rehearing of this case does not contain the required statements for rehearing en banc as provided for in Rule 14(a) and (b) of the Rules of the Sixth Circuit. The petition for rehearing does not state on its cover and in the title that it contains a suggestion for rehearing en banc, and it does not contain the required statements of counsel. En banc treatment is therefore not required because of the violation of the rules of this Court.

The petition for rehearing was considered by the panel and is found to be without merit. It is therefore ORDERED that the petition for rehearing be and it is hereby denied. Judge Merritt dissents from the Order Denying the Petition for Rehearing.

ENTERED BY ORDER OF
THE COURT
/s/ JOHN P. HEHMAN
Clerk

Filed: April 6, 1978.
(Tr-6)

TRANSCRIPT OF THE PROCEEDINGS,
AUGUST 25, 1975

• • •

MR. MELDMAN: We come now to 2-E. We want to know the names of the persons in our employ that were interviewed and state their names. I thought that was a rather simple procedure. I then was met with the argument about informer's privilege. To my way of thinking and the memorandum I filed I think covers it. The opinion of Judge Duffey, which I think is the same kind of a case from New York, covers exactly the things here as to what

we are talking about. This is not a criminal case. It so happens it is simply a civil case and we are entitled to exact information if we are to respond to the Government's request that we have certain witnesses that we don't want to disclose to them because we made a promise that we didn't disclose their names or something of that nature. I think your Honor would give short shrift to that sort of argument. This is a civil case, and we think we are entitled to that kind of information so that we can defend properly.

THE COURT: What about the work product problem in connection with it?

MR. MELDMAN: Well, we are not asking for the work product, your Honor.

THE COURT: You just want the names?

(Tr-7)

MR. MELDMAN: We just want the names, and if there were any memos taken from these witnesses, we think those should be presented to us.

THE COURT: Plus memos. Isn't that the work product?

MR. MELDMAN: No, no, these are memos from the witnesses, not comments on the memos and not any work in the office done on the memos. I don't expect that and I wouldn't ask that. That's the attorney's privilege and they can make any comments they want as to that.

THE COURT: If they give you the names, why can't you then get whatever statements you can from the witnesses directly? We don't normally go out and give statements that somebody takes from another witness.

MR. MELDMAN: If they gave us the names of everybody they interviewed via questionnaires or telephone, we

will depose them. Obviously, we would like to have the statements to see what these people said in order that we can actually defend ourselves. We feel we haven't done anything wrong. If somebody says we did, we'd like to know in what manner we are supposed to have done something wrong.

(Tr-8)

I don't think that's an unreasonable request. If we get their statements on deposition, I think that we will be protected.

THE COURT: Go ahead.

MR. MELDMAN: The next paragraph is 3 as to what standards particular to this defendant were used in determining that the jobs performed by the defendant employees were not or were of different skills so that we would know exactly how to defend against it.

THE COURT: What number is this?

MR. MELDMAN: Three, your Honor. We want to know what jobs they are talking about and what standards they use. Now, it's very simple to say they make a general statement and say they use the standards set forth in the statute, but we want to know what standards they used to distinguish between the different types of jobs. It doesn't do us much good to get an answer that the statute says it has to be either it's equal pay for equal jobs and then say everything is equal. We would like to know in what manner they were unequal as to their claim, and they certainly must have made that type of determination before they started suit, because if they didn't make that determination, then they started this suit based on nothing.

THE COURT: Okay.

(Tr-9)

MR. MELDMAN: We want a list of names, paragraph 4, of the employees who they allege we were discriminating against. Now, the answer we got was all of them. Now, your Honor, we know—and I think it was even stated here—that they didn't interview all of the employees. We, therefore, cannot defend at all if we don't know who we are supposed to have discriminated against. What is the big secret? If we did discriminate, let us know. We want to know what kind of defense we have to put up to make sure that we are covered against specific individuals.

Now, the answer to all of them is merely saying that they're not going to tell us anything, and how do we defend a case in that fashion? There is no way we can do it.

Now, those are the unanswered portions as far as we are concerned and those are the things that we require as to the informant privilege. As I say, I did file a short memorandum brief, another one. I don't know if your law clerk has had a chance to see it.

THE COURT: You are not pressing any of the other interrogatories, is that right?

MR. MELDMAN: I think they were answered, your Honor.

(Tr-10)

THE COURT: Well, Interrogatory 5 has an answer. Okay. They are answered. That is fine. If this is all you are pressing, why that's all right. We assume all the rest have been answered pursuant to your statement?

MR. MELDMAN: You'll notice that some of the later ones refer to this 4 and 5, and if we get those answered, I think it will cover that.

THE COURT: All right, sir. Mr. Overman

MR. OVERMAN: Initially, your Honor, I wish we would have been forewarned earlier that they were not going to press on their motion to compel on Interrogatories 5 through 11, or else we wouldn't have bothered briefing those issues. We got in the informer's privilege, they cite Brennan versus J.D.C.N. I believe is the name of the case out of New York, a case compelling the Government to turn over the names of the informers and provide the defendants with the statements. That is the only case I've ever seen where that has been required of the Government, and in that particular case—

THE COURT: Judge Duffey's opinion, you mean?

MR. OVERMAN: Yes.

• • •

(Tr-32)

MR. MELDMAN: 2-E, ~~your~~ Honor.

THE COURT: 2-E, yes. That's the one I am dealing with on the privilege problem, isn't it?

MR. MELDMAN: Yes, your Honor.

THE COURT: 2-E is, "Were any of the defendant's employees personally interviewed? If so, state their names." Well, I start off with that with this is an interrogatory under Rule 33. Rule 33 refers to Rule 26. Rule 26 says that parties may obtain discovery regarding any matter not privileged which is relevont to the subject matter involved in the pending action, whether it relates to the claim or defense of the parties seeking discovery or the claims of the defense of any other parties, including the existence, description, nature, custody, location of any books, documents or tangible things and the identity and

location of persons having knowledge of any discoverable matter. It seems to me that the interrogatory calls for the identity of persons who may have knowledge of discoverable matter. That's the beginning point of it.

Therefore, I have to turn back to see whether this is privileged because this applies only to non-privileged persons or non-privileged requests and to see whether there is any other provision in Rule 26 that would prevent the discovery of this particulor matter. Rule 26B3 is the one (Tr-33)
dealing with the Hickman versus Taylor material or the work product theory, or as referred to in Rule 26, trial preparation materials.

In it is basically attempts to protect trial material and it seems to me does protect the statements that were given by persons. It is intended specifically to protect statements that are given by persons that is what what was involved in Hickman. This is a recodification to a degree from Hickman. It does provide a method by which we can go through the Hickman process, and that we find this information if it is shown by the parties to be absolutely essential to his preparation, or he can't get it in in any other way, get the information any other way. I think that showing has not been made and, therefore, I will not rule that the plaintiff must give to the defendant the statements.

Now, as it comes to the names of the persons who were interviewed, the names of the persons that were interviewed is not Hickman material, is not 26B3 material, it does not fall within the work product rule. It is clearly covered directly by Rule 26B1, and when we deal with the names of the persons who have knowledge of discoverable matters, or persons have knowledge of information will be relevant to the ultimate decision in this case, that then takes

(Tr-34)
me to the claim in this case that there is a privilege.

The Government has in this case—or I guess Mr. Dunlop is the official plaintiff in this case. Mr. Dunlop has in this case initially done so, filed the privilege. He has filed the document claiming privilege by calling attention to the claim by a responsible person in the Government that this is important to the Government in this respect.

Now, I will proceed upon two assumptions then that there is a privilege, the privilege is a partial privilege. It is a privilege that will prevent disclosure only of matters which —it will permit the Government, I should say, to refuse to disclose the privilege, but if the person who is claimed to be an informer, which is claimed under the claim of Mr. Dunlop, if a person who is claimed to be an informer is a person who was a participant in the offense, it seems to me that clearly in this case persons who either are or at one time were employees of the defendant are persons who are persons who either have or may have a claim that arises in this particular case.

Therefore, the doctrine of the privilege that if he is a participant in the event, the Government is required to disclose that in fairness to the person who is opposing the
(Tr-35)
Government. This is the holding of Roviaro.

This is the holding of the rule that was drafted by the Advisory Committee on Evidence Rules dealing with informer's privilege which states the rule of Roviaro, and it does give the Government an opportunity to make a choice then as to whether to proceed or whether to not proceed. So even if we assume that there was a privilege, it seems to me in this case that it is a qualified privilege by

the very terms and is a privilege that in these circumstances, if invoked, will require some kind of action by the Court to protect the defendant, and in this instance is the holding of Judge Duffey, I think, in connection with the Wisconsin case—it was Wisconsin, wasn't it?

MR. OVERMAN: New York.

MR. MELDMAN: New York.

THE COURT: The New York case that he held. I personally have a great deal of difficulty in understanding the full line of cases that have developed holding that this is an informer's privilege. It seems to me that as a starting point we start with the view that it is important that people come forward and testify in court, and that we create privileges basically in this modern society only when legislation comes along and creates privileges.
(Tr-36)

The privilege of the informer has usually been a criminal privilege, although in some of these cases, such as this, it has been extended by the courts to include civil matters. It is, therefore, important, it seems to me, that we recognize the qualified nature of it and that we attempt to throw around it the same kind of protections in the civil matters that are thrown around it in connection with the criminal matters.

One of the kinds of protections that's thrown around it, not necessarily the privilege in criminal matters, is the doctrine of Brady V. Maryland. Now, nobody has spoken to me about Brady V. Maryland here because that is clearly a criminal law doctrine, but Brady V. Maryland does require the Government to disclose matters that's favorable to the other party, and it's quite possible in the kind of discussions that took place under those statements that,

well, we don't disclose. This one will be kept confidential, and there is or will be materials that could be thought to be favorable to the defendant and, therefore, it seems to me that it's important that the defendant be given the right to know who to interview in connection with this process.

Now, I want to underscore that it is not required by the

(Tr-37)

Government to disclose who it was that came to them first or who it was that started this investigation, or who it was that triggered this investigation, or who it was that was pushing this investigation in any way by the Government's admission in this case.

The Government, after some triggering device, has entered into an extended series of conversations or inquiry or has sent out a series of questionnaires to a number of people.

Therefore, the disclosure of all of these people who were employees at any time or who are now employees of those persons to whom those questionnaires went and from whom there were returns does not in any way identify any particular person or who was an "informer" in the sense that an informer was used in Roviaro or in other cases dealing with the informer's privilege.

I hold that you are required to disclose the names of the persons to whom and from whom you have acquired information so that the defendant may make inquiries as to what these people know. I will give you sixty days in which to give this information to the defendant, and I will reserve ruling at this time as to what will be the sanction if you do not give the information to defendant.

(Tr-38)

This is part of the informer's privilege. I am assuming that at this time there is an informer's privilege, and I think it would be unfair to assume that you would not comply with the Court's order, but I think if you still classify this as an informer's privilege, you have the right not to give the informaiton and to take such sanctions as might be imposed up to and including, of course, dismissal of the lawsuit.

Now, I hope we don't come to that. It seems to me that you have an important task of enforcing the law. You have acquired some information here, and that if this information is valid, this information ought to be brought out, but I don't want information that is either favorable to the defendant withheld, nor do I want information that is in opposition to the defendant withheld, at least to the extent that the names of those persons who could be interviewed should be given to the defendants.

Now, I guess that deals with the matter. I want an order then on that issue simply directing that the interrogatory should be answered, unless the Government persists in its claim of privilege, in which case they have sixty days in which to make this further claim, and in the event they do, I will take such steps at that time as to have to rule upon some other sanctions to apply.

(Tr-D)

TRANSCRIPT OF THE PROCEEDINGS, MAY 4, 1976

• • •

THE COURT: Just so the record is correct, I have ordered you to disclose some information and you have

refused to disclose it and you will refuse to disclose a portion of that information?

MR. OVERMAN: With one caveat. The motion to date has dealt with the discovery aspect of the case, namely whether or not at this time that the defendants are entitled to the identity of the persons to provide us the information. We have taken the position and we always have that at some time within a close proximity to the trial date that we will reveal the identity of those persons whom we intend to make as witnesses and to provide their statements.

THE COURT: I guess that doesn't satisfy the theory in which I have decided this case, though, does it?

MR. OVERMAN: I don't believe it does, no.

• • •

(Tr-11)

THE COURT: All right. I'm going to narrow this down, then. We will get it down to the nub of this thing here now. I am going to deny the motion to certify.

Now, I want you to file your additional names.

MR. OVERMAN: Can I file it with the Court, then?

THE COURT: Yes. We will see that it gets filed. Joe, you see it gets filed, if you will, please.

MR. OVERMAN: For the record, I would like to make it clear that I am presently filing with the Court plaintiff's amended answer to defendant's Interrogatory Number 2, and at the same time I am hand delivering a copy to de-

(Tr-12)

fense attorney, Mr. Meldman.

THE COURT: My understanding is these are the persons who have given you permission to disclose their names?

MR. OVERMAN: That's correct.

THE COURT: And that there are still outstanding some thirty or so persons who have not given you permission to disclose their names?

MR. OVERMAN: Correct.

THE COURT: All right.

[Filed May 27, 1976]

ORDER DENYING PLAINTIFF'S MOTION TO AMEND JANUARY 28, 1976, ORDER AND TO CERTIFY ORDER TO THE COURT OF APPEALS AND GRANTING DEFENDANT'S MOTION TO DISMISS

At a session of said Court held in the Federal Building at Detroit, Michigan, on this ..... day of May, 1976.

PRESENT: HONORABLE CHARLES W. JOINER, District Judge.

This matter having come up on the defendant's motion to dismiss for plaintiff's failure (except with respect to those employees and former employees whose identity has been disclosed in plaintiff's amended answers to defendant's interrogatory no. 2(e), pursuant to their express consent to such disclosure) to comply with a previous order to disclose to the defendant the identity of employees and former employees who were interviewed by the plaintiff and on the plaintiff's motion to amend the January 28, 1976, order and to certify order to the Court of Appeals; and briefs on both motions having been filed and the arguments of counsel having been heard thereon; and the Court being fully advised in the premises; now, therefore, for the reasons given by the Court

IT IS HEREBY ORDERED that plaintiff's motion to amend January 28, 1976, order and to ceritfy order to the Court of Appeals is hereby denied; and

IT IS FURTHER ORDERED that the defendant's motion to dismiss is granted and this cause is hereby dismissed without prejudice.

DATED: May 27, 1976.

/s/ CHARLES W. JOINER
United States District Judge

Approved:
/s/ LEONARD MELDMAN
Attorney for Defendant

Approved as to Form:
/s/ KARL OVERMAN
Attorney for Plaintiff

Supreme Court, U. S.
FILED
AUG 5 1978
MICHAEL RODAK, JR., CLERK

No. 77-1750

In the Supreme Court of the United States

OCTOBER TERM, 1978

MICHIGAN NATIONAL BANK, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not reported. The opinion of the district court (Pet. App. 4a-16a) is not reported.

JURISDICTION

The court of appeals entered its judgment on February 10, 1978, and denied rehearing on April 6,

1978. The petition for a writ of certiorari was filed on June 9, 1978. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in an action to redress violations of the Equal Pay Act the court of appeals correctly held that petitioner is not entitled to learn in discovery proceedings which of his employees has given information to the Department of Labor concerning the job duties and wages in issue.

STATUTE INVOLVED

The Equal Pay Act of 1963, enacted as a provision of the Fair Labor Standards Act, 77 Stat. 56, 29 U.S.C. 206(d), provides in relevant part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, that

> an employer who is paying a wage rate differential in violations of this subsection shall not, in order to comply with the provisions of the subsection, reduce the wage rate of any employee.

STATEMENT

The Secretary brought this action against petitioner, a banking corporation that operates a credit card business, asserting that it had violated the Equal Pay Act by paying its male credit card account collectors at a higher wage rate than it paid female collectors for work equal within the meaning of the Act (A. 6).[1] The petitioner denied the violations charged and served interrogatories asking the Secretary to identify those of petitioner's employees who had given information to the Department concerning their employer's pay practices (A. 8, 9, 11; Interrogatories 2(e) and 10). On the basis of a formal claim of privilege, the Secretary declined to submit those names (A. 46-47). The affidavit of the Acting Wage and Hour Administrator in support of the claim stated that because of possible retaliation by an employer, workers "frequently refuse or are reluctant to give information concerning violations of the Act unless they receive assurance that their identities * * * will not be disclosed" (A. 49). The Acting Administrator explained that if the Department could not assure such employees of confidentiality, "full and

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[1] "A." references are to the joint appendix filed in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

free disclosure of violations of the Act" would be seriously impeded, to the detriment of the public interest (*ibid.*).

In moving to compel answers to those interrogatories, the only specific need mentioned by petitioner was that it required the names in order "to determine the grounds of the alleged discrimination" (A. 18), although petitioner admitted in its motion that "[w]e do know the identity of most, if not all, of the employees * * * interviewed" (A. 18).

The district court granted petitioner's motion and ordered the Secretary to submit the names of all employees and former employees from whom the Department had obtained information relating to the violations charged in the lawsuit (A. 60, 62).[2] The Secretary requested the court to reconsider its ruling and suggested as an alternative that the court require disclosure of the identity of only those employees who might consent to the disclosure (A. 13). The Secretary thereafter provided petitioner with the names of 24 persons who had consented to be identified and expressed his readiness to disclose near the time of trial a list of persons the plaintiff intended to call as witnesses (A. 75, 78). Because the Secretary continued to assert the privilege with respect to the 30 employees who had given information to the Department but who had not consented to be identified, the district court dismissed the action (A. 80-81).

[2] The district court denied petitioner's request for statements given by its employees to the Department (A. 50-51, 55-56, 80). That ruling was not at issue in the court of appeals and petitioner does not raise it here.

The court of appeals reversed. It held that the order requiring the Secretary to provide petitioner with the names of all its present and former employees who had given information was contrary to its decision in *Dunlop* v. *Carriage Carpet Co.*, 548 F.2d 139, 145 (C.A. 6), which recognized the established application of the informer's privilege in Fair Labor Standards Act cases (Pet. App. 1a). The court of appeals further provided that, at least 30 days preceding trial, the Secretary shall furnish petitioner with a list of any employees or former employees whom it expects to call as trial witnesses (*ibid.*).

ARGUMENT

Contrary to petitioner's assertion (Pet. 6), the holding of the court below that the Secretary may withhold in discovery proceedings the names of persons who have given information to the Department concerning violations of the Act creates no conflict with the other courts of appeals that have considered the question. Nor does it conflict with this Court's decision in *Roviaro* v. *United States*, 353 U.S. 53; on the contrary, the principles of that case fully support the decision below. There is, therefore, no need for further review by this Court.

The decision of the court below is in accord with settled authority that the Secretary of Labor may not be compelled in discovery to inform the employer

which of its employees has given the Department information regarding the employer's possible noncompliance with statutory wage standards. Indeed, it is the sixth court of appeals to so hold. See, *e.g.*, *Mitchell* v. *Roma*, 265 F.2d 633 (C.A. 3); *Wirtz* v. *BAC Steel Products, Inc.*, 312 F.2d 14 (C.A. 4); *United States* v. *Hemphill*, 369 F.2d 539 (C.A. 4); *Wirtz* v. *Continental Finance*, 326 F.2d 561 (C.A. 5); *Hodgson* v. *Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303 (C.A. 5); *Brennan* v. *Engineered Products, Inc.*, 506 F.2d 299 (C.A. 8); *Usery* v. *Ritter*, 547 F.2d 528 (C.A. 10).[3]

Petitioner mistakenly asserts that these decisions hold that the Secretary must disclose names of employees whom the Department has interviewed (Pet. 6). What petitioner fails to note is that, in those cases, the Secretary had voluntarily provided either the names of persons who had consented to be iden-

[3] The Ninth Circuit's *per curiam* decision in *Wirtz* v. *Rosenthal*, 388 F.2d 290, does not conflict with the decision below. *Rosenthal* merely affirmed a district court order that the Secretary provide the employer with the names and any statements of employees whom the Secretary would call as witnesses. The court of appeals here likewise provided for the disclosure of the witnesses shortly before trial (Pet. App. 1a). Accord, *Engineered Products, supra*, 506 F.2d at 304; *Wirtz* v. *Hooper-Homes Bureau, Inc.*, 327 F.2d 939, 954 (C.A. 5). *Rosenthal* "[e]xpressly excluded" from disclosure the employees whom the court of appeals here held need not be identified as having given information: employees whom the Secretary would not call as witnesses. 55 CCH Lab. Cas. ¶ 31,945. The *Rosenthal* court did not disagree with the principles set forth in prior decisions of other circuits; nor have subsequent decisions disagreed with *Rosenthal*. See Pet. App. 1a; *Usery* v. *Ritter, supra; Engineered Products, supra.*

tified[4]—as was done in the instant case (A. 76-78)—or the names of all persons the Secretary believed to have any knowledge of the disputed wage practices, including all employees affected by the practice, whether or not the listed employee had provided information to the Secretary.[5] In no instance did the Secretary reveal the identities of confidential informants, and each of those decisions plainly sustained the Secretary's privilege.

Petitioner correctly points out that the privilege is not unqualified (Pet. 7). Thus, it is necessary to balance the defendant's need for information in order to prepare its case against the public interest in protecting the flow of information concerning violations of the law. *Roviaro* v. *United States*, 353 U.S. 53, 61. The ruling of the court of appeals in the instant case reflects a proper balance of those considerations.[6]

The issue in this case is whether the men and women who worked for petitioner as credit account collectors were doing equal work and, if so, whether they were paid equal wages under the Act. Petitioner

[4] See *Usery* v. *Ritter, supra*, 547 F.2d at 530, 532; *Brennan* v. *Engineered Products, supra*, 506 at 301-302 and n. 1; *Hodgson* v. *Charles Martin Inspectors of Petroleum, Inc., supra*, 459 F.2d at 304, 307.

[5] See *United States* v. *Hemphill, supra*, 369 F.2d at 541, 542; *Wirtz* v. *Continental Finance, supra*, 326 F.2d at 563; *Wirtz* v. *BAC Steel Products, supra*, 312 F.2d at 15.

[6] The court of appeals' ruling requires the Secretary to provide petitioner with a list of prospective trial witnesses before trial, a practice the Secretary routinely follows (Pet. App. 1a; A. 78).

is well situated to determine the dispositive facts. The duties of male and female credit account collectors and the wage rates paid for the performance of those duties are matters which are particularly within petitioner's own knowledge as the employer. It necessarily knows which persons have relevant knowledge of the jobs and wages in question: the collectors themselves, petitioner's own supervisors and managers, and the Department's compliance officer (A. 12-14). The Secretary has, in addition, specified the employees affected by the suit, as well as the relevant time period (A. 14). Petitioner is free to depose and to produce as witnesses any of those persons having knowledge of the facts at issue in this case. The names of particular employees who provided information to the Department are simply irrelevant. See *Wirtz* v. *Robinson & Stephens, Inc.*, 368 F.2d 114, 115 (C.A. 5), and cases cited at page 6, *supra*.

While petitioner has no apparent legitimate interest in ascertaining which of its employees provided information to the government, the public interest in ensuring the flow of information to the Department of Labor is significant. Thus, in *Dunlop* v. *Carriage Carpet*, *supra*, the Sixth Circuit noted that Congress had eschewed "detailed federal supervision" as the method of securing compliance with the Fair Labor Standards Act and has chosen instead to rely on information and complaints received from employees. 548 F.2d at 145. It is critical to this enforcement method that an employee's economic dependence upon his employer not impede his willingness to approach

officials with wage law grievances, for, as this Court has held, "it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." *Mitchell* v. *DeMario Jewelry Co.*, 361 U.S. 288, 292.

In a parallel situation, this Court recently endorsed that rationale for the privilege. In *National Labor Relations Board* v. *Robbins Tire & Rubber Co.*, No. 77-911, decided June 15, 1978, the Court explained that, because of the employer's "intense leverage" over the employment relationship, employee witnesses are " 'especially likely to be inhibited' " by fear of harassment. Slip op. 25. The Court recognized that both employees and nonemployees may be reluctant to give statements to enforcement agency representatives in the absence of effective assurance that, unless called as witnesses, their statements will not be disclosed (*ibid.*). The fact that the Fair Labor Standards Act prohibits an employer from discriminating against employees who cooperate with the Department [7] does not diminish the need for the privilege against disclosure of informants, for a "*post hoc* disciplinary action is no substitute for a prophylactic rule that prevents the harm" altogether. Slip op. 25.

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[7] 29 U.S.C. 215(a)(3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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